

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Three-Year Structural Budget
Deficit Elimination Plan Top
Priorities: (1) City-Wide Vehicle
Rental Tax, and (2) Landscaping
and Lighting District Proposals

DATE: May 21, 2008

BACKGROUND

Council is being asked to direct staff to proceed with several measures to alleviate the City's structural budget deficit that are outlined in the City Manager's May 9, 2008 Budget Addendum #4 ("Budget Addendum #4").

The purpose of this memorandum is to alert Council to legal and practical issues with the following proposed measures in Budget Addendum #4:

- (1) The City-wide vehicle rental tax; and
- (2) The Landscaping and Lighting District.

ANALYSIS

1. Proposed City-Wide Vehicle Rental Tax

Budget Addendum #4, discusses the potential of imposing a general vehicle rental tax as an alternative to increasing the hotel tax. As stated in the Addendum, our Office had advised that such a tax may be preempted by state law. After researching this issue more thoroughly, we have concluded that whether charged as a flat transactions tax, or a percentage of the rental fee, it would still be considered a use tax, and therefore is preempted by the Bradley-Burns Uniform Local Sales and Use Tax Law.

However, if the Council is interested in restructuring the City's business tax by industry, as discussed elsewhere in Budget Addendum #4, a tax specific to the rental car industry, that is based on something other than number or value of transactions, could be considered. It should be noted however, that the rental car industry is very vigilant about fighting these kinds of local taxes, which is one reason that there are none being enforced in California. Furthermore, there is a bill pending in Congress that would prohibit municipalities from enacting what the rental car industry considers "discriminatory taxes".

2. Proposed Landscaping and Lighting District

Budget Addendum #4 states as a revenue strategy the "[i]mplementation of City-Wide Lighting and Landscaping Districts or other Proposition 218 Property Related Fees."

The Department of Transportation has preliminarily identified services it proposes be funded through either a Landscaping and Lighting District or a property related fee pursuant to Proposition 218 if Council decides to pursue this strategy. The services proposed to be funded through one of these mechanisms include pruning existing street trees, sidewalk repair and curb and gutter repair, which are currently the responsibility of property owners.

Because Budget Addendum #4 appears to confuse the term LLD, and other types of assessment districts, with another funding approach called a "property-related fee", we distinguish the two funding approaches below.

a. Proposed City-Wide Landscaping and Lighting District.

The state Landscaping and Lighting Act of 1972 authorizes local governmental agencies to form LLDs to finance the installation, construction, and maintenance of landscaping, lighting, and park and recreation facilities, including graffiti removal. This law was enacted long before the voters enacted Proposition 218 which places parameters on a local agency's ability to impose taxes, fees and assessments. An imposition under the Landscaping and Lighting Act would be an assessment under Proposition 218 and subject to those restrictions.

As stated in the discussion in Budget Addendum #4, the key distinction between an assessment and other types of revenue measures, such as fees and taxes, is that an assessment is levied as a charge for the special benefit that a parcel will derive from the improvement or service provided by the assessment. Taxes, on the other hand are impositions to raise revenues for basic City services. If the LLD is established on a City-wide basis, the Engineer's Report that forms the basis of the assessment must evaluate the special benefit to each parcel of property in the entire City in order to justify the level of assessment on each parcel, and to verify that the services being paid through the assessment are not services that provide a general benefit to the public. This could be difficult to ascertain on a City wide basis in a City as large as San Jose, and with such varying levels in the condition of the infrastructure.

While San Jose has no existing LLDs, several maintenance districts have been formed, mostly to maintain median landscaping that is of a higher level than the City's standard. These maintenance districts have been established under the City's Municipal Code and the districts are relatively small given the requirement to substantiate the special benefit to be provided to each parcel.

b. Property-Related Fee Alternative

A Property-Related Fee is one that is imposed on a parcel as an incident of property ownership. Proposition 218 authorizes the imposition of property related fees if they meet all of the following requirements: (1) revenue derived from the fee must not exceed the funds required to provide the property-related service; (2) revenue from the fee must not be used for any purpose other than that for which the fee was imposed; (3) the amount of the fee imposed upon any parcel or person as an incident of property ownership must not exceed the proportional cost of the services attributable to the parcel; and (4) the fee or charge may not be imposed for service unless the service is actually used by or immediately available to the owner of the property in question. Fees or charges based upon potential or future use of a service are not permitted. This last requirement may cause problems in justifying implementation of a Property-Related Fee for sidewalk and tree maintenance which does not occur on an ongoing basis.

The procedure for imposition of the property-related fee includes the following steps: (1) the City must identify the parcels upon which the fee is proposed; (2) the amount of the fee proposed to be imposed upon each parcel must be calculated by the City; (3) the City must provide written notice by mail of the proposed fee to the record owner of each identified parcel upon which the fee is proposed for imposition; (4) the notice to record owners of property must contain the amount of the proposed fee, the basis for the fee, the reasons for the fee, and the date, time and location of the public hearing.

The public hearing requirements are the same as for an assessment district; however, if there is no majority protest summarily ending the adoption process, the City then has two options with respect to who is allowed to vote in the property-related fee election. The City can choose to use a property owner vote which requires a majority vote of approval or, in the alternative, a two-thirds vote of the electorate residing in the affected area. An agency may adopt rules similar to those for mailed ballot assessment protest proceedings to govern such elections.

HONORABLE MAYOR AND CITY COUNCIL

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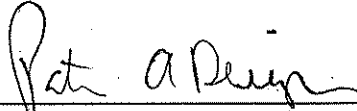
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If Council desires to direct staff to proceed with a funding mechanism for the items identified by staff for a proposed LLD in Budget Addendum #4, we recommend that staff and the Council explore the potential of both an assessment district structure and the Property-Related Fee Alternative – to determine which funding mechanism would best serve the purposes articulated by the Department of Transportation.

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